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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 359

HUGH ALLEN BOWEN,

Petitioner,

vs.

JAMES A. JOHNSTON, WARDEN, UNITED STATES PENITENTIARY, ALCATRAZ, CALIFORNIA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

HUGH ALLEN BOWEN,
Pro Se.

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JAMES A. JOHNSTON, WARDEN, UNITED STATES PENITENTIARY, ALCATRAZ, CALIFORNIA.

PETITION.

Hugh Allen Bowen, *in proper persona,* prays that a writ of Certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Ninth Circuit Court of Appeals for the Ninth Circuit entered in the above cause on June 27, 1938, affirming the judgment of the United States District Court for the Northern District of California:

Summary of Statement of Matter Involved.

The petitioner filed his petition for the writ of *habeas corpus,* complaining of his detention in the Federal Penitentiary in Alcatraz, California, alleging that he was held in violation of his constitutional rights. He was arrested by

the sheriff of Hamilton County, Tennessee, on February 12, 1931, together with one John E. Smith, charged with the murder under the laws of the State of Georgia, and placed in the Hamilton County jail. It was alleged that said crime was committed within the limits of the Chickamauga and Chattanooga National Park in the State of Georgia.

Petitioner contended that he was not a fugitive from the State of Georgia, and filed a writ of *habeas corpus* in the Hamilton County Court, demanding his release. The case was heard by the Honorable L. D. Miller. At the hearing were officials from the State of Georgia, and the Superintendent of the Chickamauga and Chattanooga National Park, with maps, the laws of Georgia and of the United States, and other papers, to show that the State of Georgia had exclusive jurisdiction over the crime, and that the United States did not have such jurisdiction.

Judge Miller, after due consideration, ruled that the State of Georgia had exclusive jurisdiction over crimes committed within the boundaries of the Park, and ordered petitioner removed to the State of Georgia, to be tried under State laws. Whereupon petitioner appealed to the Tennessee State Court of Appeals. He remained in jail ten months pending the outcome of this appeal, when the United States indicted and took him to Atlanta, Georgia, to await trial. He remained in the Atlanta County jail another fourteen months before he was tried. He urged every United States Marshal and every other person who visited the jail to ask the judge and District Attorney to give him a preliminary hearing, that he might know the nature of the offense charged against him. But at no time was he given a hearing of any nature whatsoever.

Petitioner was utterly without funds, but his Mother employed one M. Neal Andrews, an attorney of questionable legal training, to defend both the petitioner and his brother, Frank Bowen, who were jointly charged in the indictment.

John E. Smith was tried separately, convicted, and sentenced to life imprisonment.

Petitioner took a pauper's oath as a means to obtain witnesses in his own behalf and to get the court to furnish a stenographer to take the record in order that he might appeal the case, as provided for in Section 832 of Title 28, U. S. C. A.

On the morning of February 6, 1933, petitioner and Frank Bowen were taken to the Federal court room in Rome, Georgia, and the trial proceeded. The petitioner was not informed of the nature of the charge against him until after the trial was underway, when he asked the court if he were being tried for first degree murder, or for manslaughter. The court replied that it was for first degree murder and that thereafter all inquiries made on behalf of petitioner should be directed to the court by defense counsel. Petitioner then had his attorney ask the court if a stenographer were present to take the record. The court stated that inasmuch as petitioner was prosecuting the case as a pauper, the court could not feel justified in putting the Government to the additional expense of hiring a reporter to maintain the record.

Petitioner produced testimony by two surveyors to show that the crime was not committed within the limits of the Park, that the deceased's body was found more than two hundred (200) yards from the nearest bound of the Park. No testimony was offered by the Government to refute these statements. However the court instructed the jury to the effect that, inasmuch as the indictment alleged that the crime was committed within the boundaries of the Park, it should disregard the expert testimony, and so find that the United States had jurisdiction over the offense.

The Government used as a witness against petitioner, one Estell Roddy, who admitted that he was then at liberty on bail pending the outcome of an indictment for per-

jury under the laws of the State of Georgia. Petitioner took an exception to the admission of his testimony, as well as the above named part of the court's instruction to the jury. The petitioner was convicted wholly and entirely on circumstantial evidence. Not one scintilla of substantial evidence was introduced on the part of the United States.

The jury found petitioner guilty and acquitted his brother, Frank Bowen. After the court passed sentence against petitioner, his attorney served notice of appeal and told petitioner that he, the attorney, would take care of the appeal, and told the petitioner to go on ahead to the penitentiary and "don't worry about it". Petitioner was taken to the penitentiary and was quarantined in a tubercular ward of the prison hospital, away from the other inmates. He remained in this ward all the time he was in the Atlanta Penitentiary.

Petitioner had had only a fifth grade education, had never been arrested before for any crime or misdemeanor whatsoever, and had not the slightest knowledge as to what procedure to pursue in effecting his appeal. He was allowed to write to his Mother, but not to his attorney. His Mother wrote to the attorney numerous times, but he would make no reply to her letters.

Thirty days before appeal time elapsed, petitioner's Mother made an expensive trip to see Attorney Andrews regarding the appeal. Attorney Andrews told her that, to be frank about the matter, he was making a strong bid for appointment as an assistant United States District Attorney, that if he insisted on carrying out the appeal, it would greatly endanger his chance of getting the appointment, and that he suggested she engage some other attorney to proceed with the appeal. She told him that she was without funds or any other means of employing another attorney. He told her to go on back home and he would see what could be "done about it".

Two weeks after the time elapsed for taking the appeal, petitioner's Mother made another expensive trip of a hundred and fifty miles to see Attorney Andrews about the case, and he told her that he did everything possible within his power to appeal the case, but that no record of the testimony had been kept, and that there was absolutely nothing on which he could base an appeal.

Petitioner was later transferred to the Federal Hospital for Delinquents at Springfield, Missouri, from there to the Fort Leavenworth, Kansas, Penitentiary, hence to Alcatraz Prison, his present place of confinement.

Petitioner filed his petition for the writ of *habeas corpus* (No. 22539-L) on September 25, 1937, in the District Court for the Northern District of California, and on October 9, 1937, the writ was denied. Petitioner appealed to the Circuit Court of Appeals for the Ninth Circuit, and the decision of the District Court was affirmed on June 27, 1938.

The Circuit Court of Appeals in the opinion it returned stated:

> "Appellant's principal claim is that the District Court in which he was tried had no jurisdiction over the Park in which it is alleged the crime was committed • • • and that the indictment is defective in not alleging the details of such cession to the United States by the State of Georgia." Citing *Archer* v. *Heath*, 30 F. (2d) 933 (C. C. A. 9, 1929).

The Circuit Court of Appeals further stated:

> "But if the United States could constitutionally acquire jurisdiction over the park, then the question whether in fact the United States did have such jurisdiction over the Park and over the Appellant becomes a seriously controverted question of law and fact within the meaning of *Walsh* v. *Archer*, 73 F. (2d) 197 (C. C. A. 9, 1934), *supra*, and it is not within our province to question this on *habeas corpus*."

The Circuit Court of Appeals further stated in referring to petitioner's contention that he was deprived of due process of law in that he was denied the right to appeal, that he had the right to a preliminary hearing, and to be informed of the nature of the crime and to be confronted with the witnesses against him.

> "The other objections urged by the appellant are wholly insufficient in point of law and call for no discussion."

Reason for Granting the Writ.

1. The decision of the Circuit Court of Appeals in the case at bar involves important questions of constitutional law and of the State's rights. Such decisions of this Court as discuss the right of an accused to a speedy trial, to be confronted with the witnesses and to be informed of the accusation against him, and depriving him of life and liberty without due process as guaranteed by the 5th and 6th Amendments of the Constitution, indicated that the decision of the Circuit Court of Appeals in holding that the writ of *habeas corpus* will not lie, is in direct conflict with the applicable decisions of this Court, particularly the cases of *Johnson* v. *Zerbst* (decided by this Court May, 1938); *Mooney* v. *Holohan*, 294 U. S. 103; *Powell* v. *Alabama*, 287 U. S. 45; *Brown* v. *Mississippi*, 297 U. S. 278.

2. The decision of the Circuit Court of Appeals, while not specifically holding that a State could not qualify jurisdiction in its cession of land within its boundaries to the United States, it left such an inference, and is probably not in harmony with the recent case of *Collins* v. *Yosemite Park and Curry Co.* (decided by this Court May 31, 1938), and the cases of *Kohl* v. *U. S.*, 91 U. S. 367; *James* v. *Dravo Contracting Company*, 302 U. S. 134, 146, 58 Sup. Ct. 208, 214, 82 L. Ed. 114, A. L. R. 318; *Fort Leavenworth R. Co.* v. *Lowe*, 114 U. S. 525, 541, 5 Sup. Ct. 995, 29 L. Ed. —.

3. The decision of the Circuit Court of Appeals that where there is doubt as to whether or not the Court has jurisdiction over the crime, but it appears from the record by averment, intendment, and implication that the court did have jurisdiction, though such jurisdiction was expressly and specifically reserved to the State by the act of cession by the Legislature thereof, and came before the Circuit Court of Appeals for consideration, that the record can not be examined on *habeas corpus*, is probably in conflict with *Johnson* v. *Zerbst, supra*, and *U. S.* v. *Pridgeon*, 153 U. S. 48, 14 Sup. Ct. 746, 38 L. Ed. 631, and others, and in direct conflict with the Tenth Amendment of the Constitution.

4. The decisions of this Court which discuss the language of an indictment in charging the offense and describing with particularity the time, manner, and place of commission of the crime, especially where jurisdiction is involved, indicates that the decision of the Circuit Court of Appeals; *Campbell* v. *Aderhold*, 67 F. (2d) 246 (C. C. A. 5, 1933); and *Myers* v. *United States*, 256 Fed. 779 (C. C. A. 5, 1919), are probably in conflict with the applicable decisions of this Court, particularly *U. S.* v. *Hess*, 124 U. S. 483, 8 Sup. Ct. 571, 31 L. Ed. 516; *U. S.* v. *Cruikshank*, 92 U. S. 542; and *U. S.* v. *Simmons*, 96 U. S. 360.

Whether the decision of the Circuit Court of Appeals is based upon the theory that the petitioner was not deprived of due process of law and the right to a speedy trial, to be informed of the nature of the crime and to be confronted with the witnesses against him, as guaranteed by the Constitution, or whether the decision is based upon the proposition that such deprivations were of such slight degree as not to warrant interference with the void sentence through the process of *habeas corpus* (the only way open to petitioner when denied the right of appeal), or whether upon the theory that the United States District courts can exercise

jurisdiction over criminal and other process within a State, when jurisdiction over such process is expressly and specifically reserved by the State, it is submitted that the decision is in conflict with the principles of justice as announced by this Court in the cases cited in that it deprives petitioner of the right of appeal (due process) and other rights as guaranteed by the Fifth and Sixth Amendments of the Constitution, and encroaches upon the prerogatives of State rights, as laid down by the Tenth Amendment of the Federal Constitution.

WHEREFORE petitioner respectfully prays that the petition be granted.

HUGH ALLEN BOWEN,
Petitioner-Appellant,
In Proper Persona.

BRIEF IN SUPPORT OF PETITION.

Opinions Below.

There was no reported opinion of the District Court. The opinion of the Circuit Court of Appeals is printed at pages 79-84 of the record.

Jurisdiction.

The judgment of the Circuit Court of Appeals sought to be reviewed was entered on June 27, 1938. Jurisdiction to issue the writ requested is found in the provisions of Section 240 (A) of the Judicial Code, as amended by the Act of February 13, 1925.

Statement of the Case.

A statement of the case will be found in the petition.

Specification of Error.

Petitioner contends that the Circuit Court of Appeals erred:

1. In holding that the United States had jurisdiction over the offense allegedly committed by the petitioner.

2. In failing to hold that the petitioner was denied "due process".

3. In failing to hold that the bill of indictment is so fatally defective that it is insufficient to charge any offense against the United States.

4. In not reversing the judgment of the trial court and releasing petitioner as prayed for in his petition for writ of *habeas corpus*.

ARGUMENT.

The trial and conviction of the petitioner deprived him due process of law and of the right to a speedy and public trial in violation of Fifth and Sixth Amendments of the Constitution, such trial and conviction being under the color of authority usurped from the sovereign powers of the State of Georgia, in violation of the Tenth Amendment of the Constitution of the United States.

The Fifth Amendment provides that, "No person shall be * * * deprived of life, liberty, or property, without due process of law." The Sixth Amendment declares that, "In all criminal prosecution, the accused shall enjoy the right to a speedy and public trial * * * and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; and to have compulsory process for obtaining witnesses in his favor * * *." The Tenth Amendment declares, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people."

Whatever might have been the Court's opinion prior to *Johnson* v. *Zerbst*, 58 Sup. Ct. 1019, it was by that decision established that abandonment or waiver of "fundamental constitutional rights" by force or by ignorance could not be "acquiesced in by the Supreme Court of the United States. The refusal by the trial court to provide for the keeping of the record in a trial for a capital offense is tantamount to denying the accused witnesses in his favor the right of appeal, and of the assistance of counsel, within the meaning of *Powell* v. *Alabama*, 287 U. S. 45, where a "mere pretense" was substituted for a trial.

The widely controverted question as to the power of the United States to exercise jurisdiction over land acquired by cession was unmistakably settled by the case of *Collins* v.

Yosemite Park and Curry Co., 58 Sup. Ct., page 1013, where the Supreme Court said:

> "Jurisdiction obtained by consent or cession may be qualified by agreement or through offer and acceptance or ratification. It is a matter of arraingment. These arraignments the courts will recognize and respect."

The issue of whether the petitioner in the instant case was deprived of his constitutional rights is therefore presented under the Fifth and Sixth Amendments, and upon the facts of the instant case it must be held, it is submitted, he was deprived of those rights.

When the petitioner first was arrested, the Federal authorities contended that they had no jurisdiction to try him in the Federal courts, and worked in concert with the prosecuting officials of the State of Georgia to show that the State had exclusive jurisdiction, in order to effect petitioner's return on extradition to the State of Georgia, for trial under its laws. But ten months later, when the State disclosed that there was insufficient evidence to support a conviction, the United States sought and obtained an indictment against petitioner, and took him into custody.

He had been already in jail ten months, and he waited another fourteen months in Federal custody without any manner of preliminary examination whatsoever, and was not informed of the crime against him, until the day he was taken to trial, and after the trial was underway. Under the Sixth Amendment and Section 562 of the U. S. Criminal Code Act of Congress April 30, 1790, which later provides that, "• • • When any person is indicted of any other capital offense, such copy of the indictment and list of the jurors and witnesses shall be delivered to him at least two entire days before the trial," petitioner was entitled to these rights set forth therein. There could be no due process without them.

Because petitioner was without funds he made oath *in forma pauperis,* in order to obtain witnesses in his favor, and to get the court to furnish a stenographer to keep the record. The court denied this request, thereby depriving the petitioner of his right to appeal and prosecute to finality his cause under the pauper affidavit, as provided for in Section 832 of Judicial Code, amended by Act of Congress January 31, 1928.

It is just as well that the court refused to allow the witnesses to testify for the petitioner, because when the trial ended, the case ended, for there was nothing for a superior court to review. But even if an orderly appeal had been open, petitioner could not have appealed, because his attorney "sold him out" in exchange for appointment as Assistant U. S. District Attorney. This may well come under the case of *Brown* v. *Mississippi,* 297 U. S. 278. In that case, the accused had been convicted upon the confessions obtained by third-degree methods, and his constitutional right against self incrimination was thus denied. The accused was represented by counsel and it was contended that failure by counsel to move for the exclusion of the confessions, operated as a waiver of the constitutional right against self incrimination. The Supreme Court held that the denial of this right was not a mere error which could be thus waived by the attorney for the accused, but was an error which rendered the trial a nullity. Mr. Justice Hughes said, at page 286:

> "That complaint is not of the commission of mere error, but of a wrong so fundamental that it made the whole proceedings a mere pretense of a trial and rendered the conviction and sentence wholly void. Moore *v.* Dempsey, *supra.*"

In all capital, as well as non-capital, cases, the record of the trial must be preserved. In *Johnson* v. *Zerbst, supra,* the court said, at page 1023:

> "While an accused may waive the right to counsel, whether there is a proper waiver should be determined by the trial court, and it would be fitting and proper for that determination to appear upon the record."

The court further states,

> "A waiver is ordinarily an intentional relinquishment or abandonment of a known right and privilege."

The petitioner in the instant case did not intentionally waive his right of appeal; he did everything within his feeble power to persuade the court to maintain the record, that he might have something upon which to base an appeal.

Petitioner believes that under the Sixth Amendment he was entitled to a preliminary hearing. Foster Federal Practice (6th Ed., 1921), Vol. 3, p. 2578, states:

> "A person arrested under process of a Federal Court has the right to a preliminary investigation of the charge against him and to proof of probable cause before he is committed to await an indictment or for trial."

Circuit Judge Ward, in *Safford* v. *U. S.* (1918 C. C. A., N. Y.), 252 Fed. 471, 473, said:

> "It would be a scandal to arrest and imprison citizens without giving them a hearing and we would not interfere with this uniform and wholesome practice, except under absolute necessity."

Mr. Justice White said, in *Golosby* v. *U. S.* (1895), 160 U. S. 70, 73, 16 Sup. Ct. 216-218, 40 L. Ed. 343:

> "The contention at bar that, because there had been no preliminary examination of the accused, he was thereby deprived of his constitutional guaranty to be confronted by the witnesses, by mere statement demonstrates its error."

Mr. Hughes, in Federal Procedure (2d Ed.) pp. 32-33, thinks the right of preliminary examination exists in all cases.

Where a case is removed from a State to Federal court, it is incumbent upon the Federal judge to make a thorough examination to determine whether the United States has jurisdiction to try the case.

Said Chief Justice Ellsworth:

> "And the fair presumption is that a cause is without jurisdiction until the contrary appears. This renders it necessary inasmuch as the proceedings of no court can be deemed valid further than its jurisdiction appears, or can be presumed, to set forth upon the record * * * the facts or circumstances which give jurisdiction, either expressly or in such manner as to render them certain by legal intendment." *Scott* v. *Sanford* (1856), 19 How. 393, 401, 402 L. Ed. 691.

There is nothing contained in Section 424, Title 16, Act of Congress, August 19, 1890, giving Federal courts jurisdiction to serve criminal process within the Chickamauga and Chattanooga National Park. On the contrary, the act of cession by the Legislature of the State of Georgia, November 19, 1890, page 199, provides:

> "* * * Provided: that this cession is upon the express condition that the State of Georgia shall so far retain a concurrent jurisdiction with the United States over said lands and roads, as that all civil and criminal process issued under the authority of this State may be executed thereon in like manner as if this Act had not been passed; and Upon the further express conditions, that the State shall retain its civil and criminal jurisdiction over persons and citizens in said ceded territory as over other persons and citizens in the State * * *."

This language is so plain that in no sense of the word should it be misconstrued.

There can be no question about the power of the United States to exercise jurisdiction over land acquired for purposes other than enumerated in Article I, Sec. 8, Clause 17, of the Constitution; and it must be conceded that a State may qualify its cession of jurisdiction over lands ceded to the United States. The recent case of *Collins* v. *Yosemite Park and Curry Co.*, erases all doubt as to this question, when the court said:

> "Jurisdiction obtained by consent or cession may be qualified by agreement or through offer and acceptance or ratification."

The indictment charged that the crime was committed "in the Rome Division of the District aforesaid, and within the jurisdiction of said Court, and within a certain place and on certain lands reserved and acquired for the exclusive jurisdiction thereof * * * to wit, Chickamauga and Chattanooga National Park * * *". That the said defendants "did then and there unlawfully, wilfully, deliberately and with malice aforethought, upon one, Raymond Kington, a human being make an assault, * * * kill and murder him * * * by shooting and wounding him in the head and neck with a certain loaded shotgun * * * then and there held in the hands of one of the defendants but which particular one of said defendants is to the grand jurors unknown."

"In a certain place" covers an area of 28,000 acres of land, more or less, extending into two (2) counties or more. In *Partson* v. *U. S.*, 20 F. (2d) 127, the court said:

> "The allegation of the place was ineffectual, because it permitted the government to prove an offense anywhere in the large county of St. Louis, and this indictment and a judgment of conviction or acquittal under it would not protect the defendant from another prosecution for the same offense."

In the instant case it was necessary for the indictment to describe by metes and bounds, and by general particulars the place of commission of the crime, in order to show that it was committed within the limits of the Park. For sometimes the question of whether a crime is for State or Federal cognizance may turn upon an exceedingly exact location of the offense, where a man is shot when leaving a postoffice building. A foot may well turn the scale either way, with all the differences thereby involved. Often the question, too, even when the locality is fixed is one of no little difficulty. See, for example, the celebrated *Pothier* Case (1923) (D. C., R. I.), 285 Fed. 632 (1923 C. C. A.), 291 F. 311 (1924), 264 U. S. 399, 44 Sup. Ct. 360, 68 L. Ed. 759.

The petitioner was convicted along with John E. Smith, and since Smith now confesses that he and he alone was guilty, and that petitioner had not even guilty knowledge (see exhibits B and C of transcript) petitioner is entitled to discharge. In *St. Clair* v. *U. S.*, 154 U. S. 134, 14 Sup. Ct. 1002, 38 L. Ed. 936 (1894), the court said:

> "The indictment charged that the defendants, St. Clair, Spraf and Hansen, acting jointly, killed and murdered Fitzgerald. The offense was one which, in its nature, might be committed by one or more of the defendants. Proof of the guilt of either one would have authorized his conviction, and the acquittal of the other." (Page 100 of 14 Sup. Ct.)

In that case three men were charged with beating and throwing overboard from a vessel one of their own crew. It is possible for the three men to beat one man and murder him, not so in the instant case. The indictment does not allege a common design or purpose upon the part of three defendants to kill and murder, nor does it allege a conspiracy or unlawful agreement to compass a criminal purpose, nor does it allege any intent or guilty knowledge on

the part of the petitioner. It would not be possible for three men to murder one man with one shotgun. The intent and conspiracy should appear upon the face of the bill of indictment. In *U. S.* v. *Hess*, 124 U. S. 483, 8 Sup. Ct. 571, 31 L. Ed. 516, Mr. Justice Field used this language:

> "No essential element of the crime can be omitted without destroying the whole pleading."

In *U. S.* v. *Cruikshank*, 92 U. S. 542, the Court said:

> "It is an elementary principle of criminal pleading that where the definition of an offense, whether it be at common law or at statute, includes generic terms it it not suficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species—it must decend to particulars."

The indictment did not sufficiently describe the place of commission of the crime to protect the petitioner from a second conviction for the same offense. The court said: in *U. S.* v. *Burns*, Fed. Reporter, Vol. 54 (page 359):

> "The defendants should be advised more clearly * * * as to the place where it was so done, what was it, and where was it? the evidence must show it, and the District Attorney must be advised as to the place, or the prosecution must fail. Then why should not the defendants be informed? The government does not wish their conviction unless they be guilty, and it should not be permitted to demand their conviction until it has given them a full and fair opportunity to make their defense to a plain and positive charge."

And on page 361:

> "Surely it is not sufficient to say that the offense was committed at the District of West Virginia, at a place on the bank of the Little Kanowka River, and thus permit the United States to offer testimony tending to lo-

cate the place anywhere in five counties, from the source to the mouth of the river."

The Government has convicted and sentenced this petitioner to prison for the rest of his natural life, of an offense which is clearly beyond its jurisdiction, and since the District Court had no jurisdiction over the cause, nor over the petitioner, it follows that any judgment issuing therefrom is null and void.

The court below had jurisdiction to discharge the petitioner on writ of habeas corpus.

The statutes regulating the issuance of writs of *habeas corpus,* so far as here material provide:

> "Power of courts, the Supreme Court and the District Courts shall have power to issue writs of *habeas corpus*". (28 U. S. C. A. Sec. 451.)
>
> "When prisoner is in jail. The writ of *habeas corpus* shall in no case extend to a prisoner in jail unless where he * * * is in custody in violation of the Constitution or of a law or treaty of the United States * * *." (28 U. S. C. A. 453.)

The question presented is whether a judgment of conviction entered in a trial conducted in violation of the requirements of due process of law, and where it is plainly shown upon its face that the court was without jurisdiction to try is such that it "is void and may be questioned collaterally."

It is respectfully submitted that the precise question has been answered in the affirmative by the Supreme Court.

In *Moore* v. *Dempsey,* 261 U. S. 86, the prisoners had been sentenced after a trial dominated by a mob. The trial court had jurisdiction of the offense and the accused, but the Supreme Court held that the mob domination of the trial deprived the prisoners of their liberty without due process of

law, and reversed the order of the lower court, dismissing a petition for *habeas corpus*.

Moore v. *Dempsey* was followed by the Circuit Court of Appeals for the Fifth Circuit, in *Downer* v. *Dunaway*, 53 F. (2d) 586, in which it was agreed that, although the trial had been dominated by a mob, the remedy of the petitioner was by a motion for a new trial or appeal from the conviction, and not by *habeas corpus*. The Circuit Court of Appeals overruled this argument upon the ground that the failure of counsel appointed by the court for the prisoner to move for a new trial because of fear of mob violence was a failure of the corrective process of the court.

In the instant case the attorney was not dominated by any fear of a mob; he was dominated by a different type of fear—The fear that he would not be appointed an Assistant District Attorney. But he gained the appointment, and petitioner lost his right of appeal.

The analogy between deprivation of liberty without due process of law through mob domination and similar deprivation through the denial of the right to appeal and to the assistance of counsel in preparing it, was recognized by the Supreme Court in *Powell* v. *Alabama, supra*, in which it was held that:

> "• • • a defendant charged with a serious crime, must not be stripped of his right to have sufficient time to advise with counsel and prepare his defense. To do that would not be proceeding in the calm spirit of regulated justice, but to go forward with the haste of the mob." (287 U. S. at page 59.)

Now it might narrowly be construed that in the instant case there are no characteristics of mob domination discernible. But the principle announced by this Court in the cases of *Mooney* v. *Holohan*, 294 U. S. 103, and *Brown* v. *Mississippi*, 297 U. S. 278, has given the matter a broader construction. In neither of those cases was there present

any of these circumstances of mob domination, but the court nevertheless held that upon the showing of the facts there asserted, the trial in each instant was a "mere pretense." In fact the court there grouped the several different types of circumstances together and classified them all as a deprivation of constitutional right which made the trial nullity as was said by the court:

> "* * * Nor may a State through the acts of its officers, contrive a conviction through the pretense of a trial which, in truth, is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured."

There is nothing conclusive that perjured testimony was committed in the instant case, but where a witness admits under oath that he is at liberty on bail under an indictment for perjury, there exists strong indications that perjured testimony was present.

In *Johnson* v. *Zerbst*, 58 Sup. Ct. (on pages 1024-25), Mr. Justice Black said in commenting upon *habeas corpus*:

> "* * * it is open to the courts of the United States, upon an application for a writ of *habeas corpus*, to look beyond forms and inquire into very substance of the matter * * *. To deprive a citizen of his only effective remedy would not only be contrary to the rudimentary demands of justice, but destructive of a constitutional guaranty specifically designed to prevent injustice * * * The judgment of conviction pronounced by a court without jurisdiction is void, and one imprisoned thereunder may be released on *habeas corpus*."

In *Ex parte Lange*., 18 Wall. 163, 21 L. Ed. 872, Mr. Justice Miller said in delivering the opinion of the court:

> "The authority of the court in such a case, under the constitution of the United States, and the fourteenth section of the judicial Act of 1789, to issue this writ,

and to examine the proceedings in the inferior court, so far as may be necessary to ascertain whether that court had exceded its authority, is no longer an open question. While therefore, it is true that a writ of *habeas corpus* cannot generally be made to subserve the purpose of a writ of error, yet when a prisoner is held without any lawful authority, and by order beyond the jurisdiction of an inferior Federal Court to make, this court will, in favor of liberty, grant the writ, not to review the whole case, but to examine the authority of the court below to act at all."

Similar language was used by Mr. Justice Miller in *Ex parte Yarbrough*, 110 U. S. 652-653, 4 Sup. Ct. 152, 28 L. Ed. 274:

> "This court has no general authority to review, on error or appeal the judgments of the Circuit Courts of the United States, in cases within their criminal jurisdiction, is beyond question; but it is equally well settled that, when a prisoner is held under the sentence of any court of the United States in regard to a matter wholly beyond or without jurisdiction of that court, it is not only within the authority of the Supreme Court, but it is its duty, to inquire into the cause of commitment, when the matter is properly brought to its attention, and if found to be, as charged, a matter of which such a court had no jurisdiction, to discharge a prisoner from confinement."

Conclusion.

The question involved in this case are important questions of Federal law in which the opinion of the Circuit Court of Appeals is probably in conflict with decisions of this Court and which should be decided by this Court. It is, therefore, respectfully submitted that this petition for certiorari, should be granted.

Respectfully submitted,

HUGH ALLEN BOWEN,
Petitioner.